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CIMB Bank Bhd (previously known as Bumiputra-Commerce Bank Bhd) v Zima Properties Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02–2843–11 OF 2012
MAH WENG KWAI, ZAWAWI SALLEH AND UMI KALTHUM JJCA
20 MAY 2014

Banking — Banks and banking business — Conclusive evidence clause — Whether borrower/guarantors failed to show amount claimed in certificate of indebtedness manifestly wrong — Whether amount stated in certificate conclusive of debt owing and excused bank from adducing further proof of debt — Whether trial court failed to give effect to intention of parties as expressed by clear terms of contract

The appellant had sued the respondents in the High Court for the amount due under term and bridging loans it had granted to the first respondent and which were secured by a guarantee and indemnity executed by the second and third respondents. The High Court dismissed the appellant's claim holding, inter alia, that the certificate of indebtedness tendered at trial by the appellant in accordance with the provisions of the facility agreement and the guarantee and indemnity was not conclusive proof of the amount owed by the respondents; that the appellant acted in breach of contract for not fully disbursing the banking facilities and that the appellant had wrongly and unilaterally restructured the facilities. It was contended in the instant appeal that the trial judge's conclusions on the aforesaid grounds were in error.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) It was axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause was, in the absence of fraud or manifest error on the face of the certificate, determinative of the amount due. As decided by the Federal Court, a certificate of indebtedness operated in the field of adjectival law and excused the bank from adducing proof of the debt. It was for the borrower to disprove the amount claimed. In this case, the respondents failed to disprove by clear and convincing evidence that the amount claimed in the certificate demonstrated any manifest error (see paras 18–20).

(2) There was no question of the appellant having acted in breach of contract for not fully disbursing the banking facilities. The general facility agreement required the first respondent to comply with all additional conditions precedent as stated in Item 13, Schedule 1 of the agreement.

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For full utilisation and continued availability of the bridging loan, the first respondent was required to furnish reports on the project upon the appellant's request and to enter into sale and purchase agreements with the purchasers of at least 70% of the housing units to be developed. The first respondent failed to do so and the appellant's refusal of further drawdown and termination of the facilities was justified. In deciding as he did, the trial judge failed to give effect to the true intention of the parties. The terms in the agreement clearly showed the conditions precedent were mandatory and called for strict compliance on the part of the first respondent (see paras 26–28).

(3) The banking facilities were not restructured and were at all material times still continuing. After the appellant's proposal to have the banking facilities restructured was not accepted by the first respondent, the latter had applied for a second progress payment of the bridging loan. If the proposed restructuring had been implemented as alleged by the respondents, the bridging loan would have been extinguished (see para 31).

[Bahasa Malaysia summary

Perayu telah menyaman responden-responden di Mahkamah Tinggi untuk sejumlah yang kena dibayar di bawah pinjaman berkala dan penyambung yang diberikan kepada responden pertama dan yang mana dijamin oleh responden-responden kedua dan ketiga. Mahkamah Tinggi menolak tuntutan perayu memutuskan, antara lain, bahawa sijil keberhutangan yang diserahkan semasa perbicaraan oleh perayu adalah mengikut peruntukan perjanjian kemudahan dan jaminan dan indemniti bukan bukti konklusif jumlah yang dihutang oleh responden-responden; bahawa perayu bertindak dalam kemungkiran kontrak kerana tidak melepaskan keseluruhan kemudahan perbankan dan bahawa perayu telah secara salah dan secara unilateral menyusun semula kemudahan. Ia dihujahkan dalam rayuan ini bahawa kesimpulan hakim perbicaraan atas alasan tersebut adalah salah.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Adalah tak dapat disangkal bahawa sijil atau pernyataan yang dikeluarkan berikutan klausa keterangan konklusif adalah, dalam ketiadaan fraud atau kesalahan yang nyata atas muka sijil, penentu jumlah yang kena dibayar. Seperti yang diputuskan oleh Mahkamah Persekutuan, sijil keberhutangan berkuatkuasa dalam bidang undang-undang adjektif dan mengecualikan bank daripada mengemukakan bukti. Adalah untuk peminjam membuktikan jumlah yang dituntut. Dalam kes ini, responden-responden gagal untuk membuktikan dengan keterangan yang jelas dan meyakinkan bahawa

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jumlah yang dituntut dalam sijil menunjukkan apa-apa kesalahan yang nyata (lihat perenggan 18–20).

(2) Tidak terdapat persoalan mengenai perayu bertindak dalam kemungkiran kerana tidak melepaskan secara keseluruhan kemudahan perbankan. Perjanjian kemudahan am memerlukan responden pertama untuk mematuhi kesemua duluan syarat tambahan seperti yang dinyatakan dalam Item 13, Jadual 1 perjanjian. Untuk penggunaan penuh dan ketersediaan berterusan pinjaman penyambung, responden pertama dikehendaki untuk memberikan laporan ke atas projek apabila diminta oleh perayu dan untuk memasuki perjanjian jual beli dengan pembeli-pembeli sekurang-kurangnya 70% daripada unit perumahan yang akan dibangunkan. Responden pertama gagal untuk berbuat sedemikian dan keengganan perayu terhadap pengeluaran selanjutnya dan penamatan kemudahan berjustifikasi. Dalam memutuskan seperti yang dilakukan, hakim perbicaraan gagal untuk memberi kesan niat sebenar pihak-pihak. Terma-terma di dalam perjanjian adalah mandatori dan harus dipatuhi dengan ketat oleh responden pertama (lihat perenggan 26–28).

(3) Kemudahan perbankan tidak disusun semula dan pada kesemua masa material masih berterusan. Selepas cadangan perayu untuk menyusun semula kemudahan perbankan tidak diterima oleh responden pertama, responden pertama memohon untuk bayaran kemajuan kedua pinjaman penyambung. Jika penyusunan semula yang dicadangkan telah dilaksanakan seperti yang didakwa oleh responden-responden, pinjaman penyambung akan dilunaskan (lihat perenggan 31).]

Notes

For cases on conclusive evidence clause, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2512–2514.

Cases referred to

Bache & Co (London) Ltd v Banque Vernes et Commercial De Paris [1973] 2 Lloyd's Rep 437, CA (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Delta Enterprise Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 3 MLJ 293; [2005] 1 CLJ 501, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (refd)

Appeal from: Civil Suit No 22–180 of 2008 (High Court, Kota Bharu)

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Himahlini Ramalingam (Lee Hishamuddin Allen & Gledhill) for the appellant. Mohammad Rafaei bin Adnan (Muhammad Syahri bin Adnan with him) (Rafaei & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal by the appellant, CIMB Bank Bhd, against the judgment of the High Court at Kota Bharu, (Ahmad Zaidi bin Ibrahim J presiding), in which His Lordship had dismissed the appellant's writ of summons and statement of claim. The appellant had sought the following reliefs:

(a) that a judgment be entered against all the defendants in favour of the plaintiff for the sum of RM4,493,327.12;

(b) interest thereon at the rate of 3.0% (inclusive of a 1% penalty) pa above the plaintiff's base lending rate, with monthly rests, from 4 November 2008 until full payment; and

(c) costs.

[2] Being aggrieved by the said judgment, the appellant had now appealed to this court urging reversal of the judgment of the learned trial judge.

[3] We had heard Puan Himahlini Ramalingam, learned counsel appearing for the appellant and Encik Mohamad Rafae bin Adnan, learned counsel appearing for the respondents. We had considered the rival submissions made by learned counsel for the parties and perused the appeal records. For the reasons that follow, we had unanimously allowed the appeal and set aside the judgment of the learned trial judge with costs of RM30,000 here and below. Deposits to be refunded to the appellant.

FACTS OF THE CASE

[4] The brief antecedent facts of the case giving rise to this appeal can be summarised thus: The appellant by way of a letter of offer dated 26 July 2005 and a general facility agreement dated 9 October 2005, granted the first respondent a term loan of RM2,000,000 and a bridging loan of RM9,000,000. The banking facilities were to assist the first respondent in its project to develop a land located in Pasir Mas, Kelantan. The banking facilities were secured by a guarantee and indemnity dated 9 October 2005, executed by the second and third respondents in favour of the appellant.

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[5] On 13 October 2005 and 26 October 2005, the sum of RM2m under the term loan was disbursed and the sum of RM2,293,125 was drawndown under the bridging loan respectively.

[6] Vide a letter dated 30 December 2007, the appellant proposed the restructuring of the banking facilities and required the first respondent's acceptance by 13 January 2008, failing which the restructuring proposal was deemed to have lapsed.

[7] On 16 January 2008, the respondents applied for the second progress payment and furnished invoices dated in the year 2006. As the invoices furnished were outdated and fell short of the conditions precedent, the appellant, vide a letter dated 23 January 2008, requested the first respondent to furnish reports to show work progress and proof of sales and purchases. However, the first respondent failed to furnish the said reports.

[8] The first respondent's project area was prone to floods and the first respondent did not have any confirmed sales. Therefore, the appellant decided not to allow the first respondent to further utilise the bridging loan. The tenor of the term loan and the bridging loan therefore came to an end on 13 October 2008 and 26 October 2008 respectively.

[9] The appellant, through their solicitors, Messrs Lee Hishammuddin Allen & Gledhill, issued a letter of demand dated 10 November 2008. The appellant demanded for the amount of RM4,493,327.12, together with interest thereon at the rate of 3.0% (inclusive of a 1% penalty) pa above the base lending rate, with monthly rests, from 4 November 2008 until full payment.

[10] The respondents having failed to pay the sum due and owing to the appellant, prompted the appellant to commence legal proceedings against the respondents. After a full trial, the learned trial judge dismissed the appellant's claim. Hence this appeal.

THE APPEAL

[11] Before us, the appellant assailed the impugned judgment on the following grounds:

(a) that the learned trial judge had erred in deciding that the certificate of indebtedness was not conclusive proof of the amount due and owing by the respondents under the banking facilities;

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(b) that the learned trial judge had erred in deciding that the repayment of the banking facilities was by redemption of the housing units under the project; and

(c) that the learned trial judge had erred in deciding that the appellant had wrongly and unilaterally restructured the banking facilities.

[12] Before we embark upon the task of determining the merits or otherwise of the appeal, we would like to state at the outset that we were mindful of the principles of law that in respect of an appeal which turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by the trial judge for the reason that as trier of fact, the trial judge has audio-visual advantage which we did not have. Nonetheless, it would be open to us to intervene with the finding by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC); *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523).

[13] We found this to be a case in which appellate intervention was warranted.

[14] We will now deal with the grounds of appeal advanced by learned counsel for the appellant in turn.

Ground (i): Certificate of indebtedness

[15] Learned counsel of the appellant submitted that the certificate of indebtedness was the conclusive proof of the amount due and owing to the appellant. The appellant had relied on the two clauses to establish the conclusiveness of the certificate of indebtedness, that is, section 12.12 of the general facility agreement and in cl 21 of the guarantee and indemnity. Section 12.12 is in the following terms:

> CERTIFICATE OF INDEBTEDNESS
>
> It is hereby agreed that any admission or acknowledgment in writing by the Borrower or by any person authorised on behalf of the Borrower or a judgment (by default or otherwise obtained against the Borrower) or a statement of account in writing showing the Indebtedness of the Borrower which is duly certified by an officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of Indebtedness in a court of law.

[16] And cl 21 stipulates:

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EVIDENCE OF INDEBTEDNESS

Any admission or acknowledgment in writing by the Borrower or any person on behalf of the Borrower of the amount of Indebtedness and any judgment or award obtained by you against the Borrower or a statement signed by you as to the Indebtedness for the time being remaining unpaid to you by the Borrower shall be final and conclusive evidence (save for manifest errors) against me/us and shall be binding on me/us for all purposes.

[17] In reply, learned counsel for the respondents submitted that the certificate of indebtedness was defective and insufficient and not supported by the statement of accounts. It was learned counsel's contention that the learned trial judge was correct in deciding that the monthly statement of accounts with regard to the banking facilities did not show the amount due and owing as at 3 November 2008 as per the certificate of indebtedness.

[18] With respect, the submission of learned counsel for the respondents was bereft of merit. It is axiomatic that a certificate or statement issued pursuant to a conclusive evidence clause is, in the absence of fraud or manifest error on the face of the certificate, determinative of the amount due. In *Bache & Co (London) Ltd v Banque Vernes et Commercial De Paris* [1973] 2 Lloyd's Rep 437 *(Bache)* Lord Denning MR said at p 440:

I would only add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

[19] The above articulation of the rationale underlying the legal acceptance of conclusive evidence clauses was approved in the Federal Court cases of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544. The highest court of the land had decided that a certificate of indebtedness operates in the field of adjectival law, and it excuses the bank from adducing the proof of debt. It is for the borrower to disprove the amount claimed.

[20] We were of the considered view that the learned trial judge erred when His Lordship went against the entrenched principles and decided against the appellant when the respondents failed to disprove by clear and convincing

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evidence that the amount claimed and/or demonstrated any manifest error in the certificate. Indeed, he who alleges fraud or manifest error on the face of the certificate must prove it.

Ground (ii): Repayment

[21] Learned counsel for the appellant submitted that the tenor of the term loan and bridging loan was for a period of 36 months from the first drawdown. Since the sum of RM2m under the term loan and RM2,293,125 under the bridging loan were disbursed on 13 October 2005 and 26 October 2005 respectively, the tenor of the banking facilities came to an end on 13 October 2008 and 26 October 2008. In support of his submission, learned counsel relied on Items 16(iii), 16(iv), 18(iii) and 18(vii) of Schedule 2, of the general facility agreement.

[22] In reply, learned counsel for the respondents contented that the learned trial judge was correct in deciding that the appellant's claim was premature as repayment of the banking facilities was by redemption of the housing units under the project. Learned counsel relied on the letter of offer dated 26 July 2005 which provided for the principal mode of repayment was by way of redemption of units sold.

[23] In deciding that the terms of the letter of offer prevailed over the facilities agreement, the learned trial judge appeared to have disregarded an important clause enumerated at p 6 of the letter of offer which reads as follows:

> All terms and conditions as specified in this letter of offer which are not inconsistent with the terms and conditions spelt out in the Facility Agreement shall apply and be binding with full effect, *in the event of any conflict between the terms between the Letter of Offer and the Facility Agreement, the Facility Agreement shall prevail.* (Emphasis added.)

[24] To our minds, there is no ambiguity concerning the meaning of the above clause and clearly the appellant's claim on 10 November 2008 is not premature.

[25] The learned trial judge also ruled that the appellant could only rely on the terms and conditions stated in Items 16(iii), 16(iv), 18(iii) and 18(vii) of Schedule II, of the general facility agreement when the appellant fulfilled its part of the bargain. The learned trial judge further ruled that the appellant was in breach of contract for not fully disbursing the banking facilities.

[26] We did not agree with the findings of the learned trial judge. It is provided in section 6.01 (i) of the general facility agreement that the first respondent shall comply with all the additional conditions precedent as stated

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in Item 13, Schedule I of the agreement. For full utilisation and continued availability of the bridging loan, the first respondent was required to furnish reports on the project upon the appellant's request, and to enter into sale and purchase agreements with the purchasers of at least 70% of all the housing units to be developed (see Item 13(d) and Item 13(x), Schedule I of the general facility agreement). The first respondent failed to do so.

[27] It was our considered opinion that in so deciding, the learned trial judge had failed to give effect to the true intention of the parties from the terms contained therein. In our judgment, the word 'shall' appearing in those provisions clearly supports the conditions precedent are mandatory and call for strict compliance on the part of the first respondent (see *Delta Enterprise Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2005] 1 CLJ 501 (CA)). It is trite that when interpreting the terms of contract, the court will give effect to the intention of the parties as expressed in the unequivocal language they have employed. Such being the case, the appellant's action in refusing further drawdown and terminating the facilities was justified.

[28] Therefore, there was no question of the appellant having acted in breach of contract for not fully disbursing the banking facilities.

Ground (iii): Restructuring

[29] Learned counsel for the appellant submitted that the learned trial judge erred when His Lordship held that the appellant had wrongly and unilaterally restructured the banking facilities. The learned trial judge, in so deciding, relied on the appellant's letter dated 10 January 2008 which states as follows:

> With reference to your letter dated 21.01.2008, we write to inform you that the restructuring was done in accordance to the Bank's rights and powers under the letter of offer dated 26.07.2005 and facility agreement.

[30] With respect, the learned trial judge's finding ran counter to the contemporaneous documents. The appellant proposed by a letter dated 30 December 2007 the restructuring of the banking facilities and required the first respondent's acceptance by 13 January 2008. The proposed restructure, if accepted and implemented, would have converted the term loan and bridging loan into a term loan of RM4,293,000 with a tenor of two years. Based on the evidence before the court, the first respondent did not accept the restructuring proposal before 13 January 2008. Instead, the first respondent had instructed Messrs Wan Zainuddin & Co to issue the letter dated 21 January 2008 demanding an explanation from the appellant. The appellant's letter dated 10 January 2008 had to be read in the above context. The said letter merely explained that the appellant was entitled to restructure the banking facilities.

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[31] Further, as can be seen from the parties' subsequent actions, the banking facilities were not restructured and were at all material times still continuing. The first respondent vide a letter dated 16 January 2008, applied for a second progress payment of the bridging loan and the appellant had by its letter dated 23 January 2008, requested the first respondent to furnish reports and proof of sales and purchases as required under the bridging loan. If the proposed restructuring was implemented as alleged by the respondents, the subject matter referred to in the letters that is the bridging loan, would have been extinguished.

CONCLUSION

[32] For the reasons set out above, we accordingly allowed the appeal with costs.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar